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<b>R.K., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 21-0387</b>
	)	<b>Issued: May 20, 2022</b>
<b>U.S. POSTAL SERVICE, PHILADELPHIA</b>	)	
<b>PROCESSING &amp; DISTRIBUTION CENTER,</b>	)	
<b>Philadelphia, PA, Employer</b>	)	
	)	

*Andrew Douglas, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

## DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
 JANICE B. ASKIN, Judge  
 VALERIE D. EVANS-HARRELL, Alternate Judge

## JURISDICTION

On January 25, 2021 appellant, through counsel, filed a timely appeal from a January 7, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the January 7, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has met his burden of proof to expand the acceptance of his claim to include additional conditions as causally related to the accepted February 25, 1999 employment injury.

## **FACTUAL HISTORY**

OWCP accepted that, on February 25, 1999, appellant, then a 46-year-old maintenance mechanic, slipped and fell on a wet surface while in the performance of duty. Appellant indicated that his head hit the surface and that he briefly lost consciousness. He stopped work on the date of the claimed injury. OWCP initially accepted appellant's claim for a back contusion<sup>4</sup> and paid appellant wage-loss compensation for disability from work on the supplemental rolls commencing April 12, 1999 and on the periodic rolls commencing July 14, 2002.<sup>5</sup> It later expanded the acceptance of the claim to include neck sprain, herniated lumbar disc at L4-5, aggravation of underlying degenerative cervical and lumbar disc disease, chondromalacia of the patellae of the left knee, aggravation of left shoulder impingement syndrome, other psychogenic pain, and major depression disorder.

In a May 16, 2007 report, Dr. Steven H. Kahn, an osteopath and Board-certified orthopedic surgeon, reported physical examination findings and diagnosed multiple conditions, including left C6 radiculopathy, L5-S1 nerve root irritation, and left carpal tunnel syndrome. Electrophysiological testing of the lower extremities from June 11, 2008 revealed L5 and S1 radiculopathies, and electrophysiological testing of the upper extremities from June 27, 2008 showed left and right C5-6 radiculopathies.

In a November 21, 2013 report, Dr. Kahn diagnosed multiple conditions, including left C6 radiculopathy, L5-S1 nerve root irritation bilaterally, and left carpal tunnel syndrome.

On January 6, 2014 appellant requested that the acceptance of his claim be expanded to include additional conditions causally related to the accepted February 25, 1999 employment injury, including cervical radiculopathy, lumbar radiculopathy, and left carpal tunnel syndrome.

In an April 22, 2015 report, Dr. Kahn advised that appellant had multiple conditions related to the February 25, 1999 employment injury, including left C6 radiculopathy, L5-S1 nerve root irritation bilaterally, and left carpal tunnel syndrome.

On June 9, 2015 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a series of questions, for a second opinion examination and evaluation to Dr. Stanley Askin, a Board-certified orthopedic surgeon. It requested that Dr. Askin indicate whether appellant had residuals of the accepted February 25, 1999 employment injury and whether he sustained any additional conditions on February 25, 1999, other than those already accepted. In a July 10, 2015 report, Dr. Askin determined that the February 25, 1999 employment injury had

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<sup>4</sup> On October 9, 1998 appellant was involved in a nonwork-related automobile accident and suffered injuries to his neck and low back with pain radiating to his left arm and right leg. He was off work for one month due to this injury.

<sup>5</sup> Appellant remained off work, except for the period January 15 through April 5, 2010 when he worked as a part-time telemarketer in the private sector.

resolved and that appellant did not sustain any additional conditions on February 25, 1999, other than those already accepted.

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Kahn and Dr. Askin regarding residuals/disability related to the accepted February 25, 1999 employment injury. On October 19, 2015 it referred appellant, along with a SOAF and a series of questions, for an impartial medical examination and evaluation with Dr. Robert Taffet, a Board-certified orthopedic surgeon. OWCP requested that Dr. Taffet indicate whether appellant had residuals of the accepted February 25, 1999 employment injury and whether he sustained any additional conditions on February 25, 1999, other than those already accepted.

In a December 7, 2015 report, Dr. Taffet determined that the accepted February 25, 1999 employment injury had resolved. He also found that appellant did not sustain a cervical radiculopathy, lumbar radiculopathy, or left carpal tunnel syndrome causally related to the February 25, 1999 employment injury.

In a February 28, 2019 report, Dr. Kahn discussed appellant's factual and medical history and reported physical examination findings. He indicated that appellant had undergone an electromyogram and nerve conduction velocity (EMG/NCV) study on January 28, 1999 prior to the February 25, 1999 employment injury. The study revealed a left C6 radiculopathy and no evidence of carpal tunnel syndrome. Dr. Kahn opined, within a reasonable degree of medical probability, that the left C6 radiculopathy was a preexisting condition that was aggravated by the February 25, 1999 employment injury. He further maintained that appellant's left carpal tunnel syndrome was directly related to the February 25, 1999 employment injury. Dr. Kahn also opined, within a reasonable degree of medical probability, that appellant's L5-S1 radiculitis was directly related to the February 25, 1999 employment injury.

OWCP referred appellant's case to Dr. Todd Fellars, a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA). It requested that Dr. Fellars review the medical evidence of record, including Dr. Kahn's February 28, 2019 report, and provide an opinion regarding whether the acceptance of appellant's claim should be expanded. In a June 12, 2019 report, Dr. Fellars opined that appellant's left carpal tunnel syndrome was not a work-related condition. He advised that, according to current medical evidence, repetitive motion over the course of years is required to develop work-related carpal tunnel syndrome. Dr. Fellars indicated that appellant had not been working in a regular fashion since 1999 and that the medical evidence of record would not support that he had carpal tunnel syndrome "that is work-related based on his work schedule." He advised that appellant's left carpal tunnel syndrome was likely idiopathic in nature. Dr. Fellars opined that appellant's cervical radiculopathy was a preexisting condition and therefore the February 25, 1999 accident did not cause his cervical radiculopathy. He noted, "[a]dditionally, with respect to lumbar radiculopathy, this also pre-existed his work injury and therefore it could not be caused by the work injury."

By decision dated October 29, 2019, OWCP denied appellant's request for expansion of the acceptance of his claim, finding that the medical evidence of record, was insufficient to establish additional conditions as causally related to the accepted employment injury.

On October 28, 2020 appellant, through counsel, requested reconsideration of the October 29, 2019 decision.

Appellant submitted an October 15, 2020 report from Dr. Raymond Candage, a Board-certified orthopedic surgeon, who indicated that he supported appellant's request to expand the acceptance of his claim to include additional conditions. He opined that the February 25, 1999 employment injury led to an aggravation of the preexisting condition to appellant's cervical and lumbar spine. Dr. Candage advised that on February 25, 1999 appellant suffered a direct blow to the head and back, and experienced some degree of loss of consciousness. He maintained that the impact of the slip and fall was "sufficiently violent with sufficient energy expended" to cause an aggravation of cervical and lumbar radiculopathies. Dr. Candage opined that the diagnostic tests in the case record supported that appellant's neck and low back nerves were pinched due to the February 25, 1999 original injury.

By decision dated January 7, 2021, OWCP denied modification.

### **LEGAL PRECEDENT**

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>6</sup> The medical evidence required to establish causal relationship between a specific condition, and the employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>7</sup>

The Board has held that when the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable.<sup>8</sup> However, the normal progression of untreated disease cannot be stated to constitute "aggravation" of a condition merely because the performance of normal work duties reveals the underlying condition.<sup>9</sup>

### **ANALYSIS**

The Board finds that this case is not in posture for decision.

In his February 28, 2019 report, Dr. Kahn indicated that appellant underwent an EMG/NCV study on January 28, 1999, *i.e.*, prior to the February 25, 1999 employment injury, which revealed a left C6 radiculopathy and no evidence of carpal tunnel syndrome. He opined that the left C6 radiculopathy was a preexisting condition that was aggravated by the February 25, 1999 employment injury. Dr. Kahn further maintained that appellant's left carpal tunnel syndrome

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<sup>6</sup> *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>7</sup> *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

<sup>8</sup> *C.H.*, Docket No. 17-0488 (issued September 12, 2017).

<sup>9</sup> *Id.*

was directly related to the February 25, 1999 employment injury. He also opined that appellant's L5-S1 radiculitis was directly related to the February 25, 1999 employment injury.

In his October 15, 2020 report, Dr. Candage indicated that he supported appellant's request to expand the acceptance of his claim to include additional conditions. He opined that the February 25, 1999 employment injury led to an aggravation of the preexisting condition to appellant's cervical and lumbar spine. Dr. Candage advised that on February 25, 1999 appellant suffered a direct blow to the head and back, and experienced some degree of loss of consciousness. He maintained that the impact of the slip and fall was "sufficiently violent with sufficient energy expended" to cause an aggravation of cervical and lumbar radiculopathies. Dr. Candage opined that the diagnostic tests in the case record supported that appellant's neck and low back nerves were pinched due to the February 25, 1999 original injury.

In contrast to these attending physician reports, Dr. Fellars, the DMA, indicated in his June 12, 2019 report that appellant's left carpal tunnel syndrome would not be a work-related condition. He advised that, according to current medical evidence, repetitive motion over the course of years is required to develop work-related carpal tunnel syndrome. Dr. Fellars indicated that appellant had not been working in a regular fashion since 1999 and that the medical evidence of record would not support that he had carpal tunnel syndrome "that is work-related based on his work schedule." He advised that appellant's left carpal tunnel syndrome was likely idiopathic in nature. Dr. Fellars opined that appellant's cervical radiculopathy was a preexisting condition and therefore the February 25, 1999 accident did not cause his cervical radiculopathy. He noted, "[a]dditionally, with respect to lumbar radiculopathy, this also pre-existed his work injury and therefore it could not be caused by the work injury."

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>10</sup> For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.<sup>11</sup> In situations where the case is properly referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>12</sup>

The Board finds that there is an unresolved conflict in the medical opinion evidence between appellant's attending physicians, Dr. Kahn and Dr. Candage, and the government physician, Dr. Fellars, regarding whether to expand the acceptance of appellant's claim to include additional conditions causally related to the accepted February 25, 1999 employment injury.

Because there remains an unresolved conflict in medical opinion evidence regarding expansion of the acceptance of appellant's claim, pursuant to 5 U.S.C. § 8123(a), the case will be

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<sup>10</sup> 5 U.S.C. § 8123(a); *see E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

<sup>11</sup> *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

<sup>12</sup> *See D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

remanded to OWCP for referral of appellant, together with the case record and a SOAF, to a specialist in the appropriate field of medicine for an impartial medical examination to resolve the conflict. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

**CONCLUSION**

The Board finds that this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 7, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: May 20, 2022  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board